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1 Thursday, December 6, 2018

2 10:29 a.m.

3 P R O C E E D I N G S

4 **THE CLERK:** Calling case number 18-md-2843, In re
5 Facebook, Inc. Consumer Privacy User Profile Litigation, and
6 case number 18-cv-6486, People of the State of Illinois ex rel.
7 Kimberly M. Foxx versus Facebook, Inc., et al.

8 Counsel, please step forward and state your
9 appearances for the record.

10 **MR. WADE-SCOTT:** Good morning. J. Eli Wade-Scott
11 on behalf of the People of the State of Illinois.

12 **THE COURT:** Good morning.

13 **MR. BALABANIAN:** Good morning, your Honor. Rafey
14 Balabanian, also on behalf of the People of the State of
15 Illinois.

16 **MR. LOGAN:** Good morning, your Honor. Todd Logan,
17 also on behalf of the People of the State of Illinois.

18 **THE COURT:** Good morning.

19 **MR. LIPSHUTZ:** Good morning, your Honor. Joshua
20 Lipshutz on behalf of defendant Facebook.

21 **THE COURT:** Good morning.

22 **MR. BOK:** Good morning, your Honor. Greg Bock on
23 behalf of defendant Facebook.

24 **THE COURT:** All right.

25 **MS. WEAVER:** Good morning, your Honor. Lesley

1 Weaver on behalf of the PFC.

2 **THE COURT:** Good morning.

3 **MR. LOESER:** Good morning, your Honor. Derek Loeser
4 on behalf of the MDL plaintiffs.

5 **THE COURT:** Good morning. Okay. I'll guess I'll
6 start with -- is it Mr. Wade-Scott?

7 **MR. WADE-SCOTT:** Yes, your Honor.

8 **THE COURT:** I'll start with you. So when I first
9 saw this motion, my gut reaction to it was, oh, this is
10 probably going to be an easy motion. You know, the idea that
11 you could have a federal multi-district litigation proceeding
12 in San Francisco and then, you know, the District Attorney in
13 Chicago files a lawsuit in the name of the State against the
14 same defendant that's in the federal MDL, and files that
15 lawsuit in state court, asserting violations of state law, the
16 idea that that case could be dragged into federal court and
17 then sent over to the federal MDL and languish in the federal
18 MDL for however long, and it seems contrary to sort of our
19 general understanding of federalism and, you know,
20 federal-state comity, not comedy with a D, but comity with a T.

21 **MR. WADE-SCOTT:** That's right.

22 **THE COURT:** But then I started reading the cases and
23 I read this case from 1901 from the Supreme Court, whatever
24 year it was, I can't remember --

25 **MR. WADE-SCOTT:** It was 1901.

1 **THE COURT:** *Hickman*, is that what it's called?

2 **MR. WADE-SCOTT:** *Missouri Railway v. Hickman*.

3 **THE COURT:** -- *v. Hickman*, and the Ninth Circuit
4 cases and all that, and I guess there is at least a -- those
5 cases are messy. I mean, we can all agree that those cases are
6 messy, right, and that the courts don't use -- not just in
7 *Hickman* -- certainly in *Hickman*, but in other cases, the courts
8 don't use terribly precise language and, you know, there may be
9 some afterthoughts in those opinions that were not meant to
10 carry the significance that Facebook is now arguing that they
11 carry, but I think, at a minimum, it's fair to say that the
12 cases are messy, and there is at least a colorable argument,
13 I suppose, that *Hickman* stands for the proposition that when --
14 or could be read to stand for the proposition -- could
15 reasonably be read to stand for the proposition that when a
16 government actor is bringing an action on behalf of the State,
17 but the government actor is not the lead law enforcement
18 officer of the State -- the Attorney General, I think it would
19 be in most instances, right? -- the inquiry into whether the
20 State is a real party in interest is a little bit different,
21 and the test is somewhat more demanding.

22 So in a case where -- in the *Nevada* case, the Ninth
23 Circuit *Nevada* case about the mortgage fraud, you know, you
24 have -- it actually is the State of -- it was the Nevada
25 Attorney General who brought that case, right?

1 **MR. WADE-SCOTT:** Yes, your Honor.

2 **THE COURT:** So the Nevada Attorney General brought
3 that action on behalf of the State, seeking statewide relief on
4 behalf of the State's citizens, and you have sort of one test,
5 or one type of inquiry you engage in to make sure that the
6 State is, in fact, the real party in interest in a case like
7 that, and maybe you would say that there is more of a thumb on
8 the scales in favor of concluding that the State is the real
9 party in interest in that case because the Attorney General has
10 brought the lawsuit.

11 So it's still possible that the State is not the
12 real party in interest, right, if the Attorney General brings
13 an action on behalf of one individual and seeks to recover, on
14 behalf of that -- let's say, a wage and hour lawsuit or
15 something like that, right? -- and seeks to recover, you know,
16 back pay on behalf of that one individual, that even though the
17 Attorney General has brought the lawsuit, that still is not --
18 you know, the State is not the real party in interest in a
19 situation like that, but the test for whether the State is the
20 real party in interest isn't so stringent.

21 In contrast, where you have some sort of subsidiary
22 state entity, like a Railroad Commission or the Coastal
23 Commission or, you know, the Port Commission, or the State's
24 Attorney, or the City Attorney, that it's a different inquiry,
25 and it really -- I don't know exactly what the test would be.

1 We could talk a little bit about what the test ought
2 to be. Maybe it's as simple as that one passage that they keep
3 quoting from the *Hickman* case from 1901, or maybe that's
4 over-simplifying it too much and that's placing more weight on
5 those words than they can bear, as the lawyers like to say, but
6 the main point, the larger point, is perhaps that is a
7 reasonable way to read the cases, that the test is different
8 depending on a whether it's a subsidiary state entity or a
9 subsidiary government entity bringing the action in the name of
10 the State as opposed to the State -- you know, the primary law
11 enforcement officer of the State.

12 So I have guess that's the sort of big picture
13 question I'd like to start with, with you. Do you agree that
14 it's a different test, or have I read too much into this messy
15 case law? Is it too much of an effort to bring sanity to this
16 sort of chaotic set of cases that have been handed down over
17 the last century plus?

18 **MR. WADE-SCOTT:** Your Honor, unfortunately, the
19 cases are -- I do agree that they are a little bit messy. I do
20 not think that *Hickman* stands for the proposition that there's
21 a different test when the Attorney General is bringing the
22 case. What *Hickman* stands for is, we have to look at whether
23 the State is actually interested in case. That's pretty easy
24 when the Attorney General, as in the *Nevada* case, the Attorney
25 General is present, pursuant to statutory authority, enforcing

1 some sovereign interest.

2 The better way to reconcile the cases is to, for
3 instance, take a look at *Nevada*. There, the court does a
4 detailed analysis of what the State's interests are, and that's
5 the analysis that *Hickman* demands. *Hickman* says, we have to
6 look at what the interests of the plaintiff here are, and then
7 the Railroad Commission. It's not a sovereign interest of the
8 State to lower the rates for passage over this bridge. That's
9 the Railroad Commission's interest.

10 But then on the other side of the spectrum is the
11 *Nevada* case, where the Ninth Circuit is very clear that
12 enforcing a state's consumer protection laws, protecting the
13 state's citizens from being defrauded, is a sovereign interest
14 that substantiates the State's interest in the case.

15 And also in the *Nevada* case, they look at what the
16 remedies are, not lowering the railroad rates, but saying the
17 State is looking for civil penalties and injunctive relief.
18 These are things that are consistent with the sovereign
19 interest of the State, going back a long way.

20 **THE COURT:** So in the *Hickman* -- so you would say
21 that -- you would say that the *Hickman* case would have come out
22 the same if the Attorney General had brought the case, and in
23 fact, I think it may be -- I can't tell from *Hickman*, but
24 I think the Attorney General may have brought the case.

25 **MR. WADE-SCOTT:** We have tried to figure that out,

1 your Honor.

2 **THE COURT:** Okay.

3 **MR. WADE-SCOTT:** It's not clear.

4 **THE COURT:** And I guess -- I'm guessing the briefs
5 from that 1901 case are not on Westlaw.

6 **MR. WADE-SCOTT:** (Laughs.) We thought about
7 stopping by, you know, the Supreme Court or the Library of
8 Congress --

9 **THE COURT:** I'm not a hundred percent sure they
10 would be there, but let's assume for sake of argument that the
11 Attorney General didn't bring the case. Even though it seems
12 like, from the statutory scheme that they were describing, that
13 it may have had to have been the Attorney General, but assuming
14 it wasn't the Attorney General, you would say it doesn't
15 matter -- if the Attorney General had brought the case, it
16 would have been the same outcome because it's based on the
17 Supreme Court's analysis of whether -- of the State, as a
18 state, its interest in the outcome of the case, its interest in
19 the lawsuit, and the Supreme Court in that case conducted an
20 analysis and concluded that it wasn't really a matter of
21 statewide interest.

22 Maybe you could argue that the Supreme Court was
23 wrong in its analysis, but that's the analysis that you have to
24 conduct, and then you compare that to the *Nevada* case, and you
25 look at this case, and this case is more like the *Nevada* case

1 than the *Hickman* case.

2 **MR. WADE-SCOTT:** Yes, your Honor, that's what we're
3 saying. As an example, take *Lucent* as well. If the Attorney
4 General had brought the *Lucent* case, I expect the outcome would
5 have been the same. The problem is that you're seeking relief
6 there for one person.

7 **THE COURT:** Which, the *Lucent* case was the one
8 that --

9 **MR. WADE-SCOTT:** That's the --

10 **THE COURT:** -- the DFEH brought --

11 **MR. WADE-SCOTT:** Correct, your Honor.

12 **THE COURT:** -- on behalf of an individual employee
13 who had been discriminated against?

14 **MR. WADE-SCOTT:** Yes, and sought reinstatement and
15 back pay and that kind of thing.

16 **THE COURT:** Right, right, right.

17 **MR. WADE-SCOTT:** So what the court directs, in our
18 view, is a real analysis of what the interests are, but the
19 Ninth Circuit has set out what the interests are and they're
20 completely consistent with what the State's Attorney is seeking
21 on behalf of the State here.

22 A quick note about *Nevada*. I think that it's
23 helpful to look at what the *Nevada* court says about the remedy,
24 the civil penalties and injunctive relief issue, because it's
25 not relief that is available to any private party. The problem

1 with *Hickman*, I think, is that the Railway Commission is the
2 one that's trying to get the rates for the passage over
3 Boonville Bridge lowered, and that that goes to the passengers.

4 The remedy here that the State's Attorney seeks is
5 one that is only available pursuant to this statutory authority
6 granted by the State; that the County, for instance, can't
7 bring this case, nor could the State's Attorney in her own name
8 bring this case. This is a remedy that's only available to the
9 State. We think, under *Nevada*, it's pretty straightforward.

10 **THE COURT:** What is -- I mean, I kind of know how
11 this works in California, but in Illinois, where does the money
12 go?

13 **MR. WADE-SCOTT:** Your Honor, it depends. We think
14 that the court who would award the money would have some
15 discretion to disburse it between the State treasury or the
16 County treasury. It's actually not entirely clear.

17 **THE COURT:** Huh.

18 **MR. WADE-SCOTT:** Yeah.

19 **THE COURT:** I mean, has there ever been a case in
20 Illinois where the State's Attorney has brought an action
21 pursuant to this statutory scheme in the name of the State, and
22 the money has gone to the State treasury?

23 **MR. WADE-SCOTT:** No, there's no cases that we could
24 find going any particular direction, but our --

25 **THE COURT:** I mean, I don't know how much it

1 matters. I mean --

2 **MR. WADE-SCOTT:** Well, that's our view.

3 **THE COURT:** -- I was just curious. I mean, the
4 point I assume you would make is that -- emphasize is that this
5 is money that is not going to some subset of private
6 individuals, or even the entire set of, you know, private
7 individuals in the State of Illinois or the people who use
8 Facebook in Illinois or whatever. It's money that's going to
9 the State.

10 **MR. WADE-SCOTT:** That's correct, your Honor.

11 **THE COURT:** To the government. It's money that's
12 going to either the State treasury or the County treasury.

13 Now, is there any limit in Illinois to what -- if
14 the money goes to the County, is there any limit to what the
15 money can be used for, as there is in California?

16 **MR. WADE-SCOTT:** No, your Honor.

17 **THE COURT:** Because in California, I think you --
18 you know, if the DA brings one of these actions and recovers
19 civil penalties, that money -- I don't remember the precise
20 contours of the restriction, but it has to be used -- that
21 money has to be used to -- in connection with further
22 enforcement of the consumer protection laws.

23 **MR. WADE-SCOTT:** There's no statutory proscription
24 within the ICFA that says that. We think -- when you're
25 looking at what the remedy is, and your Honor, you already got

1 at this point a little bit, what we're looking at is, this is a
2 law enforcement case, essentially. The point is that the
3 money -- the point is where the money comes from, in our view,
4 though, you know, if that's a little facile, but the point is
5 that it's penalizing someone. That's what the point of the
6 civil penalty is.

7 So the fact that Facebook -- this money is going to
8 go away from Facebook and go toward, you know, government
9 interests, and that we're seeking injunctive relief to protect
10 a broad swath of consumers, it's just -- *Nevada* is all -- on
11 all fours on the sovereign interest issue, and if you look at
12 the district courts that have followed it under the UCL cases,
13 we cite a host of them, and we think that *People v. Born*
14 (phonetic), *Dringleheim* (phonetic), and those are --

15 **THE COURT:** Yeah, but those cases -- I think the
16 problem with those cases is that they don't meaningfully engage
17 on the question whether the test should be different, if it's a
18 subsidiary government entity.

19 I think, for the most part -- correct me if I'm
20 wrong, point me -- if you have cases that have meaningfully
21 engaged on that particular question, let me know, but I think
22 for the most part, they kind of assume without analysis that
23 because the case has been brought by the Orange County District
24 Attorney on behalf of the people, pursuant to this statutory
25 scheme, that it is the State, and that the same type of -- you

1 would engage in the same type of analysis that the court
2 engaged in in the -- the Ninth Circuit engaged in in the *Nevada*
3 case without stopping to ask, well, does it need to be a
4 different test because it's a subsidiary governmental entity.

5 **MR. WADE-SCOTT:** There's -- no, your Honor, but we
6 would advocate that if you look at the cases, I mean, *Hickman*
7 and forward, there's not really any evidence that this is a
8 two-step analysis. The question is, what are the State's
9 interests in the case?

10 If you've got a Railway Commission or the DFEH, that
11 prompts the question of, what is the State's interest in this
12 case? But it doesn't mean that, for instance, an entity has to
13 be the alter ego of the State and then you look at whether the
14 State's interests are present. It's just one analysis.
15 There's just no evidence for the "two" step, basically, in the
16 cases.

17 *Lucent*, the DFEH case, is actually kind of
18 interesting on that point. The court is looking at the relief
19 that's going to be sought, and clearly finds that most of it is
20 going to go to this individual employee, but the court does
21 acknowledge that the DFEH seeking injunctive relief, that is
22 something that the State is interested in, but they discard it
23 as tangential. But the fact that the DFEH is seeking the
24 injunctive relief, there's no "two" step there. The Court is
25 just asking, is this injunctive relief sought by this entity,

1 does that benefit a sovereign interest? And we say, follow
2 that same analysis here. You're looking for a sovereign
3 interest.

4 **THE COURT:** Okay. Couple other questions about
5 Illinois' statutory scheme.

6 It's clear, I gather, that, as in California, the DA
7 or the subsidiary government official in Illinois is empowered
8 to bring -- seek statewide relief under this statute. Is that
9 sort of established in Illinois?

10 Because in California, there is a California Court
11 of Appeal opinion that was decided recently that says no, the
12 subsidiary government official only has the authority to seek
13 relief within the boundaries of that official's jurisdiction.

14 I think, as a matter of statutory construction, that
15 California Court of Appeal decision is almost certainly wrong,
16 and I think that the statute makes pretty clear that a local
17 government official authorized to bring actions under this
18 statute may seek statewide relief, and if the Attorney General
19 doesn't like it, the Attorney General can intervene and take
20 over the case and move the case in a different direction.

21 But how does it -- is that clearly established in
22 Illinois, that, you know, the State's Attorney in Cook County
23 can seek statewide relief in the name of the State under this
24 statute?

25 **MR. WADE-SCOTT:** I would not say that it's clearly

1 established. There is no appellate authority deciding it, nor,
2 as far as we know, no Supreme Court authority, of course.

3 There is no barrier within the State Attorney's
4 constitutional authority to represent the State to do that, and
5 the wording of the statute itself is -- we think cuts probably
6 the direction toward the State's Attorney being able to
7 represent the entire interests of the State.

8 However -- and we have some of the same features.
9 There's good reason to think that if it came down to it, the
10 Attorney General could get involved in a case like this brought
11 by the State's Attorney.

12 **THE COURT:** That was the next question I was going
13 to ask. So this case that you filed is a case that seeks
14 statewide relief, right?

15 **MR. WADE-SCOTT:** We -- it certainly seeks relief
16 for the benefit of the entire state. The injunctive relief
17 would run to the entire state.

18 **THE COURT:** Right.

19 **MR. WADE-SCOTT:** And we think the State's Attorney
20 has the authority to seek relief for the entire state at the
21 end of the day, yes.

22 **THE COURT:** And you're saying that's not clearly
23 established in appellate case law, but that's what this
24 court -- this case seeks to do, and you believe that you have
25 the authority to do that.

1 Now, what about this issue of intervention? Like,
2 could the -- let's say this case goes back to state court in
3 Illinois. Could the Attorney General come in and kind of take
4 over for you in the case, and direct -- and move the case into
5 a different direction, in the way that I believe the California
6 Attorney General can do if a local or government official
7 brings a similar case?

8 **MR. WADE-SCOTT:** That's not an issue that's clearly
9 resolved, but we think that as a matter of the Attorney
10 General's constitutional authority and the way this has been
11 looked at, *People ex rel. Devine* is a case that's cited pretty
12 frequently in the briefs that we think says -- that says the
13 most about what the Attorney General is able to do versus the
14 State's Attorney, and in that case, it cites some other Supreme
15 Court authority that certainly suggests that the Attorney
16 General could intervene in this case.

17 I don't know that the Attorney --

18 **THE COURT:** Intervene and take it over, or just
19 intervene?

20 **MR. WADE-SCOTT:** I don't -- there's --

21 **THE COURT:** I mean, there's -- my understanding, and
22 I'm not a hundred percent sure this is right, but I believe
23 that in California, the Attorney General can not only
24 intervene, but can intervene and take over the case and say,
25 well, you know, sorry, on behalf of the People of California,

1 we are no longer seeking X relief, we're only seeking Y relief,
2 or whatever.

3 **MR. WADE-SCOTT:** That particular question is not
4 resolved in Illinois. Where the legislature grants concurrent
5 authority to the State's Attorneys and the Attorney General,
6 there is, at least in the criminal context, a case suggesting
7 that the Attorney General can't completely set the State's
8 Attorney aside.

9 The reason we don't have good authority on this is
10 because --

11 **THE COURT:** Yeah, well, the criminal context is,
12 I assume, a little bit different.

13 **MR. WADE-SCOTT:** Um-hum, but I can't stand here
14 today and tell your Honor exactly what would happen. The one
15 very clear thing about what the Attorney General's authority --
16 and the reason I mention that *Devine* case is, the Attorney
17 General has the authority to settle the case out from a state's
18 attorney. There's no question about that.

19 **THE COURT:** Okay.

20 **MR. WADE-SCOTT:** But we don't think -- just to very
21 briefly bring it back to what the analysis is supposed to be,
22 the State has set up a consumer protection scheme that can be
23 enforced both by its Attorney General and its state's
24 attorneys, and under the analysis as we would advocate it
25 exists following *Nevada*, the fact that the jurisdiction of the

1 State's agent is different does not answer the question of
2 whether there's a sovereign interest in the case, because --

3 **THE COURT:** Could the State deputize by statute a
4 private citizen to bring an action in the name of the People of
5 Illinois against Facebook for violating the privacy rights
6 of -- what if the statute said, any citizen of -- any resident
7 of the State of Illinois could bring an action on behalf of the
8 people for violations much privacy rights, or whatever, and
9 some citizen brought a lawsuit in state court in the name of
10 the People against Facebook, and it got removed to federal
11 court, sent over to San Francisco. Would you be taking the
12 same position, that that -- that the State is the real party in
13 interest, even though it's just some random citizen who brought
14 the lawsuit?

15 **MR. WADE-SCOTT:** The Ninth Circuit --

16 **THE COURT:** That what matters is that the State
17 passed a statute authorizing that individual to represent the
18 interests of the State?

19 **MR. WADE-SCOTT:** It depends on what remedies the
20 State authorized the individual to seek. So if what the State
21 authorized the individual to seek is civil penalties and
22 injunctive relief, then the Ninth Circuit analysis would say,
23 look at that, look at what the sovereign interest in the case
24 is, and that's not.... There's a case, actually, that's cited
25 in the briefs called *Scachitti*. It's an Illinois Supreme Court

1 case about relaters, and whether or not the State is the real
2 party in interest, and in a case like that -- and the Illinois
3 Supreme Court certainly thinks that it still is, because the
4 issue is not the individual that brings it, but what the
5 State's interests actually are.

6 But to the extent that those are edge cases, and I'm
7 sure there's an argument to be made about it, this is not. The
8 state's attorneys are long-standing agents of the State in both
9 criminal and civil contexts, and can carry out the statutory
10 scheme as the State has decided.

11 I acknowledge there's an independent analysis that
12 this Court has to do under federal law, but that has to take
13 into account what the sovereign interests of the State are, as
14 the Ninth Circuit has laid it out, and that's -- it's just very
15 straightforward.

16 I'll say one last thing, which is, as your Honor
17 started this hearing by saying, one would think that a case
18 like this brought by an Illinois regulator, removed out of
19 state court and then sent over to a federal MDL, within
20 concerns of state sovereignty and how subject matter
21 jurisdiction works, this is a case that should go back. The
22 default here is, there's no subject matter jurisdiction.

23 So to the extent this is messy, it's Facebook's
24 burden, and we think that just looking at the way Illinois
25 handles this and the way the Ninth Circuit does, this is a case

1 that does not belong here.

2 **THE COURT:** Doubts need to be resolved in favor of
3 remand.

4 **MR. WADE-SCOTT:** Very much so, your Honor.

5 **THE COURT:** Yeah. What about the question I asked
6 you yesterday? If -- let's say this goes back to state court
7 and let's say you pursue your action in state court against
8 Facebook and you lose on the merits, okay? Would the Illinois
9 Attorney General then be allowed to bring the same lawsuit in
10 Illinois state court against Facebook and Cambridge Analytica?

11 **MR. WADE-SCOTT:** I have little doubt that Facebook
12 would argue yes. I'm interested to hear. In our view, that is
13 not resolved by the existing law. There's certainly no
14 authority on point.

15 **THE COURT:** Well, what do you think that -- well,
16 what's the analysis? I mean, what would the -- what do you
17 think the answer is? It's not been resolved by the cases.
18 What's the answer, and why?

19 **MR. WADE-SCOTT:** Your Honor, standing here today,
20 I can't be certain one way or the other.

21 **THE COURT:** Well, that's why I didn't ask you the
22 question today. That's why I asked you the question
23 yesterday --

24 **MR. WADE-SCOTT:** Yes, Judge.

25 **THE COURT:** -- because I thought it was a

1 complicated question that you needed some time to think about
2 and research, maybe consult with people. So what's the answer?

3 **MR. WADE-SCOTT:** What you'd have to look at is
4 whether or not the arguments that we've made here, that the
5 State's interest are present in the case, means that the
6 State's Attorney is the very same party as the Attorney
7 General, or whether they're in privity.

8 So I think that Facebook can make arguments that a
9 loss on the merits in this case would preclude every other
10 State's agent from representing the State's interests, but
11 I can't say for certain that that would be true.

12 **THE COURT:** What, and there's no case law in
13 Illinois on that question?

14 **MR. WADE-SCOTT:** Not that I've been able to dig up,
15 your Honor.

16 **THE COURT:** What about, I mean, there are other
17 states -- I mean, I know I just asked you the question
18 yesterday, but there are other states that have similar
19 schemes. California is one, and there are other states.
20 I mean, has this question been addressed in other states, as
21 far as you're aware?

22 **MR. WADE-SCOTT:** Not that I've been able to
23 determine since yesterday, your Honor.

24 **THE COURT:** Uh-huh.

25 **MR. WADE-SCOTT:** I was trying to figure out

1 Illinois, but I'm --

2 **THE COURT:** You know, I think, as a practical
3 matter, you know, if you go -- if you go back to state court
4 and you get trounced on the merits, the Illinois Attorney
5 General is not likely to bring a case --

6 **MR. WADE-SCOTT:** That's why we -- yes.

7 **THE COURT:** -- but if the Attorney General could
8 bring a case, were permitted to bring another case against
9 Facebook, doesn't that seem relevant to the question of whether
10 the State is the real party in interest in this case?

11 **MR. WADE-SCOTT:** Actually, I don't think it's
12 relevant, following the interest analysis as we see it.

13 **THE COURT:** If the litigation doesn't bind the
14 State -- I understand that none of the messy cases that have
15 undertaken this analysis have engaged on the question of
16 whether the action by the subsidiary government official would
17 be binding on the State as a whole, so as to preclude the
18 superior government official from bringing a later lawsuit, but
19 it seems -- but my question to you is, doesn't that seem
20 relevant to the question whether the State is the real party in
21 interest in a case like this?

22 I mean, whether the State would actually be bound by
23 the case, isn't that relevant to whether the State is the real
24 party in interest?

25 **MR. WADE-SCOTT:** Whether all of the State's

1 interests are present in an individual case does not answer the
2 question of whether the State's interests are present in a
3 case -- in this case. So I don't think that it actually
4 resolves the question.

5 **THE COURT:** So you would say -- okay, let's assume
6 that the State -- that the State is not bound by the outcome of
7 this lawsuit that you've brought, and the Attorney General
8 could, in the future, bring a lawsuit to -- even if you lost on
9 the merits. How, in that case, could the State still be the
10 real party in interest in this case?

11 I mean, if the DFEH brings a lawsuit on behalf of an
12 employee who's been discriminated against, and we litigate
13 whether the discrimination occurred, and DFEH loses that
14 lawsuit, I assume -- I don't know, but I assume that the
15 employee is bound by that, that the employee then couldn't
16 bring another lawsuit alleging the same discrimination, right?
17 And that's part of why -- I assume that's part of why the
18 employee is the real party in interest in that case, and not
19 the State.

20 **MR. WADE-SCOTT:** Sure. If the question is -- it
21 goes back to the question of whether or not we can be sure that
22 the State's Attorney has the ability to seek statewide -- other
23 than injunctive -- well, we certainly have the ability to seek
24 statewide injunctive relief. However, a loss by the State's
25 Attorney representing the State in this case would plainly bind

1 the State as to -- let's take the narrowest version of the
2 State's Attorney's authority. He only represents the people of
3 the State of Illinois in Cook County. We still think that
4 that's a case where the State's interests are presented, and a
5 loss there would bind as to the People of the State of Illinois
6 within Cook County. That's clear.

7 **THE COURT:** But theoretically, Cook County -- if she
8 loses in Cook County, then every other county can -- then the
9 next county can sue Facebook, and the next county after that
10 can sue Facebook, and the next county after, and then the
11 Attorney General can come clean up if all the counties lose,
12 theoretically.

13 **MR. WADE-SCOTT:** Or if all the counties lost,
14 I would suspect that.... I think that as a practical matter --

15 **THE COURT:** Or all three of the counties lose.

16 **MR. WADE-SCOTT:** Yeah. As a practical matter, your
17 Honor, that's why this question is not resolved. I don't know
18 that a court would then, after a loss on the merits where
19 the -- pursuant to the ICFA authority a state's attorney is
20 bringing the case, that other state's agents could then bring
21 the case. I just -- I can't be certain because we don't have
22 case law that's on point.

23 **THE COURT:** Okay.

24 **MR. WADE-SCOTT:** But as a -- I'm sorry.

25 **THE COURT:** Sorry, go ahead.

1 **MR. WADE-SCOTT:** As I said, the fact that, taking
2 the narrowest view of the State's Attorney's authority, that
3 the State has -- in this case, it's brought in the name of the
4 people of the State. Looking at the interest analysis as the
5 Ninth Circuit looks at it, I don't think that all of the
6 interests of the State are -- every citizen that composes the
7 People of Illinois has to be present in the State in order for
8 the State to have a sovereign interest in the outcome.

9 Think about it, for example, as a criminal
10 prosecution. The state's attorneys of the various counties
11 bring cases that are in the interest of the State, though they
12 concern only things that happened within their county, and the
13 way that the Ninth Circuit handles this, they look at what the
14 remedies are and whether or not they're essentially
15 government-facing.

16 The civil penalties and injunctive relief serve the
17 State's interest in enforcing their consumer scheme. Whether
18 or not it's done by an agent in one county or whether it's done
19 by their Attorney General, the sovereign interest analysis is
20 not so cramped, and I don't think that you can find in the
21 existing case law anything that suggests that the State's
22 interests are precluded by having, for instance, an officer
23 with more limited jurisdiction bringing a case in the interests
24 of the State. You just look at the State's interests as they
25 stand in *Nevada*.

1 **THE COURT:** Okay, I understand the argument.

2 **MR. WADE-SCOTT:** Thank you, your Honor.

3 **MR. LIPSHUTZ:** Your Honor, surprisingly, maybe
4 unsurprisingly, I disagree with most of what was just said, but
5 as opposing counsel was presenting his argument, it struck me
6 that he's really proving our point here, which is that the
7 State of Illinois is not a party to this case, and many of the
8 positions that you just heard taken by opposing counsel would
9 be directly opposed by the Illinois Attorney General if she
10 were here today, I have no doubt. We heard opposing --

11 **THE COURT:** Well, why isn't she here? I mean, why
12 hasn't she -- I mean, this sort of gets to the question that
13 I asked about whether the Attorney General has the authority to
14 intervene in a case like this and take it over.

15 **MR. LIPSHUTZ:** The Illinois Attorney General is not
16 here because the Illinois Attorney General, together with
17 attorneys general from many other states around the country, is
18 investigating the very same activities that are the subject of
19 this lawsuit, and has decided, at least so far, not to bring a
20 lawsuit against Facebook, none of the attorneys general across
21 the country.

22 **THE COURT:** Has there been an announcement, we've
23 completed the investigation, we've decided not to bring a
24 lawsuit against Facebook?

25 **MR. LIPSHUTZ:** No, quite the contrary. The

1 investigation is ongoing --

2 **THE COURT:** Okay.

3 **MR. LIPSHUTZ:** -- and the Illinois Attorney General
4 is part of that, and again --

5 **THE COURT:** So to the extent -- I mean, I took what
6 you were saying to be an implication that the Attorney General
7 has made a decision not to sue Facebook, but I guess that's not
8 what you're saying.

9 **MR. LIPSHUTZ:** No, my point is simply that that
10 decision has not been made yet. The investigation is ongoing.
11 The Illinois Attorney General, like many other attorneys
12 general across the country, is deciding what to do with the
13 Cambridge Analytica situation.

14 Cook County decided to bring a case merely weeks
15 after the Guardian article came out in March of this year, and
16 the difference between Cook County bringing the case and
17 Illinois bringing the case is a critical one under the Ninth
18 Circuit's own jurisprudence, and if the Court looks at the
19 *Lucent* decision -- this is why we have this two-step analysis
20 in our brief. If the Court looks at the *Lucent* decision,
21 page 739, footnote 6 --

22 **THE COURT:** Hold on, let me pull it back up.

23 **MR. LIPSHUTZ:** Sure.

24 **THE COURT:** Okay.

25 **MR. LIPSHUTZ:** In footnote 6, the Ninth Circuit

1 explains -- and this is quoting *Hickman* -- the Ninth Circuit
2 explains that the State -- this is a quote,

3 "The State cannot possess the ability to defeat
4 federal diversity jurisdiction over an action
5 between what would otherwise be two diverse
6 citizens -- "

7 **THE COURT:** Wait, I'm sorry. I want to get to the
8 footnote. I'm having trouble.

9 **MR. LIPSHUTZ:** Yes.

10 **THE COURT:** Give me a quick second.

11 **MR. LIPSHUTZ:** Of course.

12 **THE COURT:** Oh, I see the problem. I was On judge
13 Ikuda's dissent.

14 **MR. LIPSHUTZ:** Don't read that one.

15 **MR. WADE-SCOTT:** You're welcome to, your Honor.

16 (Laughter).

17 **THE COURT:** I did read it. I thought it was
18 interesting.

19 Okay, footnote 6.

20 **MR. LIPSHUTZ:** In footnote 6, the Ninth Circuit
21 says,

22 "The State cannot possess the ability to defeat
23 federal diversity jurisdiction over an action
24 between what would otherwise be two diverse citizens
25 merely by enacting legislation pursuant to its

1 police powers."

2 And that is exactly what has happened here.

3 **THE COURT:** But it's also true that you have to look
4 to state law to get a sense of whether their action is --
5 whether the State is the real party in interest. It's
6 ultimately a federal question, and perhaps the State couldn't
7 pass a statute to give some random individual the ability to
8 file some lawsuit in the name of the State and call it, you
9 know -- call it a lawsuit in pursuit of state interests when
10 it's really not, but --

11 **MR. LIPSHUTZ:** But respectfully, the distinction
12 between delegating an individual citizen to bring the suit and
13 delegating a county to bring the suit, or a county official to
14 bring the suit, is not a meaningful distinction. It's not a
15 distinction at all with respect to what the Ninth Circuit is
16 saying here in that footnote.

17 **THE COURT:** Well, I think he would agree with -- he
18 would probably agree with you on that, and he would say, what
19 matters is whether this is a lawsuit trawl actually on behalf
20 of the State, where the State is the real party in interest,
21 and just because it's a subsidiary government official who's
22 bringing the action doesn't mean the State is not the real
23 party in interest.

24 **MR. LIPSHUTZ:** Well, a couple responses to that.

25 One, the fact that it's a county official bringing

1 the action, that is a difference, because a county official
2 does not have the same kind of immunity from suit in federal
3 court that the State itself has. The County and the county
4 officials are citizens of Illinois, diverse citizens, for
5 purposes of --

6 **THE COURT:** What do you mean, they don't have
7 immunity from -- in federal court, a county official?

8 **MR. LIPSHUTZ:** Eleventh Amendment immunity does not
9 apply to sub-state actors. So if the State of Illinois has --

10 **THE COURT:** I think it applies -- I thought that it
11 applied to district attorneys.

12 **MR. LIPSHUTZ:** In -- when they are prosecuting in
13 the criminal context, yes, it does.

14 **THE COURT:** But when they're performing a state
15 function, right, when they're --

16 **MR. LIPSHUTZ:** No.

17 **THE COURT:** -- when they're performing a function on
18 behalf of the State.

19 **MR. LIPSHUTZ:** When they're prosecuting in their
20 criminal capacity on behalf of the sovereign State of Illinois,
21 yes, they would have Eleventh immunity --

22 **THE COURT:** Yeah.

23 **MR. LIPSHUTZ:** -- but there is no case in which a
24 county, or the State's Attorney from the county, has brought a
25 civil action, and any court has said that there's no diversity

1 jurisdiction.

2 **THE COURT:** But that's -- if but they are, again,
3 prosecuting them in the name of the People of Illinois, which
4 is what they are doing with this civil action --

5 **MR. LIPSHUTZ:** Well, okay, so let's test that.

6 **THE COURT:** -- why aren't they -- I mean, I don't
7 think -- you're saying that if Kimberly Foxx does something in
8 connection with her duties under state law to bring civil
9 actions along these lines, that -- and somebody sued her, she
10 wouldn't be entitled to immunity?

11 **MR. LIPSHUTZ:** Eleventh Amendment immunity? If this
12 was a civil suit?

13 **THE COURT:** Yeah.

14 **MR. LIPSHUTZ:** I don't think she would.

15 **THE COURT:** Why not?

16 **MR. LIPSHUTZ:** I don't think there's any case saying
17 that.

18 **THE COURT:** Why not? I mean, she is -- why is she
19 not serving in her capacity as a state official in the same way
20 that she's doing so when she's prosecuting criminal actions?

21 **MR. LIPSHUTZ:** Because under the Illinois
22 Constitution, the Attorney General is the only person who is
23 eligible, as the exclusive representative of the State of
24 Illinois; and so the sovereign immunity of the State of
25 Illinois extends to the Attorney General, but does not extend

1 to a county official, where the County does not itself have
2 Eleventh Amendment immunity, which it would not here.

3 But even if you want to put that issue aside and we
4 want to look at whether this suit is being pursued to behalf of
5 the State -- what has been called the State's interests, it's
6 not, and I think the argument you heard here proves that's not.

7 The money that would be collected, as we just heard
8 from opposing counsel, the money that would be collected in
9 this suit will not go to the State treasury. There is a
10 provision in the Illinois statute that's at issue here, the
11 consumer fraud statute, there is a piece of the policy, the
12 portion of the policy that deals with elder fraud, which is a
13 small piece of what they're bringing, there's a provision in
14 the statute that requires those penalties to go to the State
15 treasury. There is no similar provision for the rest of the
16 penalties, the bulk of the penalties, and we just heard --

17 **THE COURT:** And what -- so are you in agreement that
18 the law doesn't say anything about those penalties?

19 **MR. LIPSHUTZ:** The law, the statute doesn't say
20 anything about those penalties, but by virtue of not saying
21 anything about those penalties, the money is going to go to the
22 plaintiff in this action. The plaintiff is Kimberly Foxx, the
23 County Attorney, and we haven't heard anything to -- any
24 disagreement on that point.

25 **THE COURT:** And by that you mean, not into her

1 pockets --

2 **MR. LIPSHUTZ:** No, of course not.

3 **THE COURT:** -- but into the DA's budget.

4 **MR. LIPSHUTZ:** Into the DA's budget, to be used
5 however the DA wants, for purposes of benefiting the County.
6 So that's not a State interest. The --

7 **THE COURT:** Why is that not a State interest?

8 **MR. LIPSHUTZ:** Because it's a County interest, and
9 again, it goes to this distinction between the State --

10 **THE COURT:** But why is it not a State interest
11 for -- I mean, the DA is a subsidiary law enforcement officer
12 of the State. Why is it not in the State's interest to empower
13 these subsidiary law enforcement officers to bring actions on
14 behalf of the State with the result being that penalties go
15 into the coffers of the subsidiary government actor?

16 **MR. LIPSHUTZ:** Because the U.S. Supreme Court has
17 foreclosed that exact situation from being -- from destroying
18 diversity jurisdiction. If your Honor reads the *Port of*
19 *Seattle* decision, which post-dated *Hickman*, 1921, the U.S.
20 Supreme Court addressed this exact situation, with no
21 complications. It's actually quite a straightforward case
22 that's directly on point. And it said, the Port, that was a
23 sub-state actor, the Port of Seattle, had a direct financial
24 interest in the result, and then it said diversity was not
25 destroyed even though, quote, "the State also has an interest."

1 So there, the money was going into the coffers of
2 the sub-state actor. The State -- it was a quiet title action
3 in favor of the State of Washington and the Port of Seattle,
4 and yet even though the State was going to benefit from that
5 judgment by getting title to the property, the Supreme Court
6 said that does not destroy diversity jurisdiction because the
7 money was going into the coffers of the sub-state actor, not
8 directly into the State treasury. That is exactly this
9 situation.

10 And so *Port of Seattle* -- forget *Lucent*, forget, you
11 know, the Ninth Circuit's disagreements between *Lucent* and
12 *Nevada v. Bank of America*. Just look at the U.S. Supreme
13 Court, *Port of Seattle*, 1921. It is squarely on point and has
14 never been overruled.

15 If you want to get into the obvious distinctions
16 between the *Lucent* case and the *Nevada v. Bank of America* case,
17 those distinctions, the reason the *Lucent* case was a much more
18 difficult case was because, again, it was a sub-state actor,
19 just like *Port of Seattle*.

20 *Nevada* is an easy case. *Nevada v. Bank of America*
21 is an easy case because the Attorney General brought the
22 lawsuit. This footnote 6 concern of the Ninth Circuit from
23 *Lucent* is not implicated because the State in that circumstance
24 is not bestowing its sovereign authority or bestowing the
25 ability to destroy diversity jurisdiction onto an actor who

1 would not otherwise have it. It's simply the State bringing
2 the case --

3 **THE COURT:** But this footnote doesn't say that, hey,
4 the State can't defeat diversity by bestowing authority to
5 bring an action on behalf of the State on subsidiary actors.
6 It's a much more general statement.

7 **MR. LIPSHUTZ:** Well, it's a statement about
8 defeating diversity jurisdiction. It says the State cannot --
9 so it's a command -- the State cannot defeat what would
10 otherwise be diversity jurisdiction by enacting legislation.

11 That's what's happened here. If this was a suit
12 between the County of Cook and Facebook, those would be --
13 there would be diversity, we would remove that case, but
14 because the Illinois legislature has bestowed this authority on
15 the county official, suddenly they're destroying -- the
16 argument is that they've destroyed diversity jurisdiction.
17 That is the situation that is being addressed, and it cites
18 *Hickman*, which again, is a very similar situation.

19 But you asked -- your Honor asked the question
20 yesterday about preclusion.

21 **THE COURT:** Yeah.

22 **MR. LIPSHUTZ:** Well, the answer to that, under
23 Illinois law, as I read Illinois law, is that this suit, if
24 Cook County loses this suit, would not be preclusive on the
25 Illinois Attorney General, for a very simple reason.

1 The Illinois Constitution says that the Attorney
2 General has the exclusive authority to represent the State.
3 That's the *Bear Stearns* decision from the Illinois Supreme
4 Court, as well as many others. The Illinois Supreme Court has
5 held --

6 **THE COURT:** But that's not -- that doesn't come
7 directly from the Illinois Constitution, right?

8 **MR. LIPSHUTZ:** It does, actually.

9 **THE COURT:** That's a statement -- okay, show me
10 that.

11 **MR. LIPSHUTZ:** It is -- right, the word "exclusive"
12 is not in the Constitution, but the Constitution says the
13 Attorney General is the law enforcement officer of the State.

14 **THE COURT:** Right.

15 **MR. LIPSHUTZ:** And the Illinois Supreme Court,
16 construing the Illinois Constitution, has said that that means
17 exclusive. They've used the word "exclusive" many times.

18 **THE COURT:** Well, I think they said -- I mean,
19 I don't think the question was posed whether the state's
20 attorneys, pursuant to this statutory authority, also were
21 authorized to act as law enforcement authority of the State.

22 **MR. LIPSHUTZ:** Well, no, but in several other cases,
23 including the *Devine* case that was mentioned which was against
24 Time Marketing, and other cases like the *Briceland* case, 65
25 Illinois 2d. 485, the Illinois Supreme Court has held that the

1 legislature lacks the power to diminish the authority of the
2 Attorney General by, for example, delegating some of his
3 authority to another state actor.

4 So that's in *Briceland*, that's in *Time*, and it
5 actually --

6 **THE COURT:** What case is that?

7 **MR. LIPSHUTZ:** *Briceland*, 65 Illinois 2d. 485,
8 page 501, from 1976, but also in the People versus -- *People ex*
9 *rel. Devine v. Time* that was discussed earlier, 336 Illinois
10 Appellate 3d. 74, from 2002, and in that *Time* case, in *Devine*
11 *v. Time* case, that was an action under the same statute by a
12 state's attorney, and the Illinois Attorney General went out
13 and settled the case by getting an assurance of voluntary
14 compliance agreement with the defendant --

15 **THE COURT:** Say that one more time. Back up a
16 couple sentences --

17 **MR. LIPSHUTZ:** Sure.

18 **THE COURT:** -- and say that again.

19 **MR. LIPSHUTZ:** So in the *Time* case, the *ex rel.*
20 *Devine v. Time* case, the Cook County official, the Cook County
21 State's Attorney, same official that's at issue here, brought a
22 case under the same statute. While that case was pending, the
23 Illinois Attorney General went out and effectively settled the
24 case, went to *Time*, together with other attorneys general, and
25 entered into an assurance of voluntary compliance agreement,

1 basically getting Time's assurance that it will comply with
2 what the state law wanted, and settled the case and released
3 the claims.

4 And in the *Time* case, the Cook County State's
5 Attorney and the Attorney General of Illinois were actually
6 fighting with each other over whether the Illinois Attorney
7 General could settle the case out from under the Cook County
8 State's Attorney, and the Cook County State's Attorney's
9 position, much like you've heard here, is that the Illinois
10 Attorney General could not do that, and the Court said no, the
11 Attorney General has certain exclusive powers under this
12 statute, including, for example, the power to investigate,
13 which the Cook County State's Attorney does not have, and the
14 power to settle the case by means of an assurance of voluntary
15 compliance agreement, and because the Constitution prevents the
16 legislature from diminishing the Attorney General's power by
17 giving power to the State's Attorney, the Attorney General
18 retains exclusive authority to negotiate those deals on behalf
19 of the State, and the Attorney General's interest was not
20 aligned with the State's Attorney here, and that's --

21 **THE COURT:** But is that -- but it strikes me that
22 that case could cut against your argument in a certain sense,
23 which is that the Attorney General has the power -- if the
24 Attorney General wants to undercut Cook County in this case,
25 she can, and I'm presuming that the Attorney General could

1 intervene in the case if she wanted to, maybe to cause the case
2 to move in a different direction. Maybe she could do an
3 intervene on behalf -- intervene and cause the case to be
4 dismissed. I don't know.

5 **MR. LIPSHUTZ:** Perhaps, your Honor --

6 **THE COURT:** I think it's -- I think you need to move
7 the mike a little bit further away.

8 **MR. LIPSHUTZ:** I was taking the advice too early.

9 **THE COURT:** My new year's resolution is to get new
10 microphones in this courtroom.

11 **MR. LIPSHUTZ:** Sounds like a good idea, your Honor.

12 That may be so, but it again establishes -- what it
13 actually establishes is that they are different parties. They
14 are different parties with different interests. The Illinois
15 Attorney General has her own interest in these matters, the
16 Cook County State's Attorney has her own interests in these
17 matters, and they are different parties.

18 **THE COURT:** Well, that's one way to look at it, but
19 the other way to look at it is we, the State, want not only our
20 Attorney General but subsidiary law enforcement officers to be
21 empowered to bring actions in the name of the State. In the
22 event of disagreement, the Attorney General can trump it, the
23 Attorney General can come in and settle the case out from under
24 the State's Attorney. Perhaps the Attorney General can come in
25 and put a stop to the case or move the case in a different

1 direction.

2 So yeah, in the event of disagreement, the AG is the
3 boss, but we are nonetheless empowering more than just one of
4 our government officials to bring actions in the name of the
5 State, on behalf of the State.

6 **MR. LIPSHUTZ:** And all that may be well and good,
7 but it doesn't destroy diversity jurisdiction, and that's the
8 difference. That's what *Port of Seattle* says. Because the
9 State of Washington and Port of Seattle could have come in and
10 said, we have no interest this property, we disclaim it. But
11 it doesn't matter, because the money at issue in the case was
12 going to the subsidiary entity, not to the State.

13 **THE COURT:** Right, but I mean, the assumption is the
14 that State of Seattle -- I mean, excuse me -- the State of
15 Washington, it is perfectly consistent with -- oh, I see,
16 that's your point. You're going to say, that's my point,
17 right?

18 **MR. LIPSHUTZ:** That's my point.

19 **THE COURT:** Yeah.

20 **MR. LIPSHUTZ:** That's exactly right. So the
21 question is not whether the State could take over the case or
22 intervene in the case. The question is whether they are one
23 and the same, and they are not, when there's an sub-state actor
24 that brings the action.

25 And there's another example of this. There is an

1 MDL in the Eastern District of Pennsylvania, the *Avandia* MDL.
2 There, like here, the County of Santa Clara, from California --

3 **THE COURT:** Oh, is this the opioids?

4 **MR. LIPSHUTZ:** Yeah. The County of Santa Clara came
5 in with an enforcement action, and it was removed and sent to
6 the MDL, and the MDL court there refused to remand the case
7 back to state court -- actually, denied the remand and
8 certified the question under 1292(b) to the Third Circuit.

9 **THE COURT:** So now the Third Circuit is deciding
10 this question implicating California's sovereignty, and this
11 court, and potentially the Ninth Circuit, may be deciding this
12 question relating to Illinois' sovereignty.

13 **MR. LIPSHUTZ:** Well, in a sense --

14 **THE COURT:** So --

15 **MR. LIPSHUTZ:** -- but not really, because --

16 **THE COURT:** So it's kind of messed up, but anyway,
17 I'm sorry --

18 **MR. LIPSHUTZ:** No, no, no. I mean, the question is
19 one of federal law. The question is what destroys diversity
20 jurisdiction.

21 **THE COURT:** Yes, but it's bound up in --

22 **MR. LIPSHUTZ:** Sure.

23 **THE COURT:** -- what the State's interests are and
24 the State's system for enforcing its own laws, I think.

25 I mean, I don't think you could --

1 **MR. LIPSHUTZ:** Sure.

2 **THE COURT:** -- disagree with that.

3 **MR. LIPSHUTZ:** Well, unless you take *Hickman* at its
4 word and *Lucent* at its word when it quoted *Hickman* and said, in
5 this situation where it's not the State bringing the case, the
6 only question is whether the money inures solely to the benefit
7 of the State.

8 **THE COURT:** But neither of those two cases said --

9 **MR. LIPSHUTZ:** I know.

10 **THE COURT:** -- in this situation where the State is
11 not bringing the case. That's the problem, and I guess that
12 gets me to another question, which is, you have teased out what
13 I think is a colorable -- I won't even say interpretation of
14 the cases, but that you have presented a colorable way of
15 understanding these cases, a reasonable way of understanding
16 these cases, but the cases don't actually say what you're
17 saying, right? You've proposed a reasonable way of
18 understanding them, but perhaps they have also proposed a
19 reasonable way of understanding them, and so the answer is, the
20 tie goes to remand.

21 **MR. LIPSHUTZ:** No, because their way doesn't work
22 under *Port of Seattle*. Their way of understanding the case
23 does not work under *Port of Seattle*, and actually, *Lucent*,
24 footnote 6, the language I quoted, does effectively say what
25 I'm saying. It may not say it exactly the same way, but the

1 import of that footnote in *Lucent* is that where it's not the
2 State itself, where it's some actor that would be diverse from
3 the other side, like a county, that there is a concern that
4 state courts will seek to destroy diversity jurisdiction by
5 empowering those citizens -- and a county is a citizen -- with
6 the authority imbued by the State in order to destroy diversity
7 jurisdiction.

8 That is a concern that the Ninth Circuit has
9 identified, and it, in my view, perfectly explains the
10 distinction between the *Nevada v. Bank of America* case and the
11 *Lucent* case on the other hand, and the *Hickman* case on the
12 other hand, and the *Port of Seattle* case on the other hand. So
13 it's more than a colorable interpretation. I think it's the
14 best way of understanding the statutes.

15 And the -- we know, from counsel's own argument here
16 today, that the money that's recovered here is not going to go
17 to the State coffers, it's going to go to the County. The
18 County has already given 20 percent of the money to a private
19 law firm. They couldn't do that if it was the State's money.

20 **THE COURT:** That's -- I don't think that's relevant
21 at all.

22 **MR. LIPSHUTZ:** Well, I don't see how they could do
23 that consistent with the statutory scheme if it was truly the
24 State's money. How can the County give away 20 percent of the
25 State's money to a private lawyer?

1 Anyway, we can agree to put that issue aside, but
2 I think it does raise questions as to whether this is really
3 the State's lawsuit.

4 And we know that this isn't the State's lawsuit also
5 because we know the Illinois Attorney General is still engaged
6 in communications and investigation on this very issue and has
7 not yet made a determination as to whether to bring a lawsuit.

8 **THE COURT:** Let me ask you, you mentioned the
9 *Avandia* MDL and you said that it's been certified. So I gather
10 it's pending in front of the Third Circuit now?

11 **MR. LIPSHUTZ:** You know, I don't know whether the
12 Third Circuit granted the 1292 or not. We don't know the
13 answer to that, but if they did, then it would presumably still
14 be pending there, *Avandia*.

15 And look, the reality is --

16 **THE COURT:** And what --

17 **MR. LIPSHUTZ:** I'm sorry, your Honor.

18 **THE COURT:** Oh, I'm sorry, I just want to make sure
19 I don't forget to ask this question of you.

20 Have you found any other MDLs where this has come
21 up? Because it's not uncommon -- I was going to go down the
22 hall and ask Judge Breyer if they came up in the *Volkswagen*
23 case. I haven't done that yet, but it strikes me that it is
24 probably not uncommon for a local jurisdiction to file a
25 lawsuit against a defendant who's been pulled into a federal

1 MDL.

2 MR. LIPSHUTZ: That's right, and it's also not
3 uncommon for those cases to end up in the MDL, and that was --

4 THE COURT: So what are some other examples of that?

5 MR. LIPSHUTZ: I think the *Volkswagen* one did have
6 one. I think there was an *Apple* one --

7 MR. WADE-SCOTT: Not with a fight on remand, just
8 to clarify.

9 THE COURT: What?

10 MR. WADE-SCOTT: Not with a fight on remand.

11 THE COURT: Just, they ended up there.

12 MR. WADE-SCOTT: They're in the MDL, so --

13 THE COURT: That is at least of some marginal
14 relevance, I suppose.

15 MR. LIPSHUTZ: Right. No, not -- the fight over
16 remand was in *Avandia*.

17 THE COURT: Yeah.

18 MR. LIPSHUTZ: And the local enforcement agency, the
19 County of Santa Clara, lost that fight.

20 THE COURT: So far.

21 MR. LIPSHUTZ: So far, that's right. There are
22 other circumstances -- and we can send a supplemental letter if
23 your Honor would like, but I've seen other circumstances,
24 I think there was an *Apple* one, I think there was a *Volkswagen*
25 one, where there were local enforcement actions. We have

1 briefing on this in one of our earlier briefs in this case, but
2 I'll find it for your Honor.

3 **THE COURT:** One of your 5,000 briefs that you've
4 filed in this case.

5 **MR. LIPSHUTZ:** One of our 5,000 -- yes, your Honor,
6 where local enforcement actions wind up in the MDL, and they
7 stay there.

8 And if you think about it, it makes a lot of sense.
9 A State Attorney General action cannot end up in a federal MDL,
10 because it's unquestionably not removable, right? A state --

11 **THE COURT:** I think there was some -- in the
12 *Volkswagen* MDL, I think there were some State Attorney General
13 actions.

14 **MR. LIPSHUTZ:** Well, I guess it's possible --
15 I guess if the State Attorney General is, to my opposing
16 counsel's point, is bringing the action specifically to achieve
17 restitution on behalf of somebody, some individual, maybe my
18 statement is too broad, but in most circumstances, a State
19 Attorney General action would not be removable, and therefore,
20 would not find its way into an MDL.

21 But think about how many local jurisdictions there
22 are all over the country. If you had every local jurisdiction
23 with the ability to bring a state court action on the same
24 facts that are subject to the MDL and there was no mechanism
25 for getting all those actions into federal court and over to

1 the MDL, that alone would significantly undermine the whole
2 purpose of the MDL. I mean, these are the same facts, the same
3 claims, and they could be pending in hundreds of local
4 jurisdictions around the country, based on my opposing
5 counsel's reading of removal law.

6 Now, that may not be --

7 **THE COURT:** I mean, the idea of undermining the
8 purposes of the MDL, the purpose of the MDL is to get all the
9 federal cases decided by one federal court. It's not to get
10 all cases filed throughout the country in front of one federal
11 court. And MDLs -- all kinds of MDLs we have, we have the
12 federal MDL and then we have ongoing state court cases.

13 I mean, my other MDL is the *Monsanto* case --

14 **MR. LIPSHUTZ:** Right.

15 **THE COURT:** -- where just across the street in state
16 court there was, like, a 260 gazillion dollar verdict against
17 Monsanto.

18 **MR. LIPSHUTZ:** Fair enough. It doesn't solve the
19 problem, and there's --

20 **THE COURT:** And there's nothing wrong with that.

21 **MR. LIPSHUTZ:** And there's nothing wrong with that,
22 but whereas here, it is a local --

23 **THE COURT:** And I mean, I'm not saying there's
24 nothing wrong with -- I'm not taking the position either way on
25 whether there's anything wrong with the verdict. All I -- for

1 the record, in case -- (laughter) -- anybody wants to
2 misconstrue that. I'm just saying there's nothing wrong with
3 litigation happening in state courts on the same issue that is
4 being dealt with in a federal MDL.

5 **MR. LIPSHUTZ:** Of course, your Honor.

6 **THE COURT:** Whew!

7 **MR. LIPSHUTZ:** Record clarified. My point is simply
8 that if states can start deputizing all different kinds of
9 local entities to bring these suits, and then they start
10 popping up in state courts all over the country, that does, in
11 a sense, undermine the MDL, because those suits should be
12 removable. They're brought by actors who are diverse citizens
13 of their individual states. They're not brought by the State
14 itself. They should be removable and they should be part of
15 the MDL, because there is federal jurisdiction, federal
16 diversity jurisdiction, over those cases.

17 **THE COURT:** Yeah, and I think that point kind of
18 begs the question, but you've adequately addressed the
19 question. We have had a good discussion of the question, and
20 it's a very interesting issue, and I'll think about it for a
21 while, and --

22 **MR. LIPSHUTZ:** And the last point I would make, your
23 Honor, is, it is an interesting issue. I don't think either
24 side has found, your Honor, the case squarely on point, except
25 for *Port of Seattle*, which I think is squarely on point, as

1 I might have mentioned, but if your Honor, like the *Avandia*
2 court, thinks this is a very difficult question, I think one
3 option here would be to deny the remand and certify under 1292,
4 and we can find out what the Ninth Circuit -- how the Ninth
5 Circuit reconciles all these very seemingly irreconcilable
6 cases.

7 **THE COURT:** Okay.

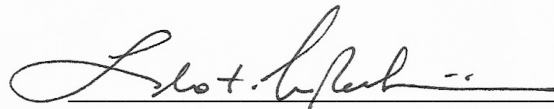
8 **MR. WADE-SCOTT:** Your Honor, if I could, very
9 briefly, because I didn't talk about the *Port* case. It's a
10 little bit difficult to parse, but the *Port* case is not on
11 point, because it's a case that concerned whether or not the
12 Port could collect rental fees, and the Court found that even
13 though the State would collect some money from the rental fees,
14 the State's interests were not the predominant ones in the
15 case, because it's the Port.

16 The fact is that you can reconcile *Hickman* and *Port*,
17 *Port of Seattle* and *Lucent* very easily by saying the State does
18 not have carte blanche to say that any individual can go forth,
19 and we have an interest in that individual's rights being
20 vindicated, or we have an interest in the port collecting its
21 rental fees. The interests have to be the sovereign interests,
22 as *Nevada* thought about them, which is the interests of
23 protecting consumers, or not just those interests, but as
24 applicable here, interests in protecting a broad swath of
25 consumers.

CERTIFICATE OF TRANSCRIBER

I, Leo Mankiewicz, certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages of the official electronic sound recording provided to me by the U.S. District Court, Northern District of California, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken; and, further, that I am not financially nor otherwise interested in the outcome of the action.

 12/07/2018

Signature of Transcriber

Date